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No. 425

In the Supreme Court of the United States

OCTOBER TERM, 1970

SCHIEFFELIN & CO. AND BEITZELL & CO., INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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1. Petitioners commenced these protests in the Customs Court challenging the internal revenue tax and tariff duty levied against 86 proof bottled spirits imported from Ireland and Scotland between March 1964 and April 1965. These Irish and Scotch whiskey importations in bottles were taxed at the rate of $10.50 per gallon under 26 U.S.C. 5001(a)-(1). (Pet. 3), and assessed a duty of $1.02 per gallon (Pet. 8).

Petitioners contend that the imposition of these taxes on Irish whiskey violated the national treatment provision in the Treaty of Friendship, Commerce and Navigation with Ireland, 1 U.S.T. 788. This provision (Art. XVI, 1 U.S.T. at 797), states that "in all mat-

ters affecting internal taxation and sale, distribution, storage and use," the United States will accord to products imported from Ireland, "national treatment," that is, treatment "upon terms no less favorable than the treatment accorded * * * *in like situations*, to" products of the United States (emphasis added). (Art. XXI, 1 U.S.T. at 801.) As to Scotch whiskey, petitioners rely on the treaty with Great Britain, 8 Stat. 228, assuring most favored nation treatment with respect to "duties."

Petitioners claim these treaty provisions are violated because in practice bottled domestic whiskey below 100 proof bears tax at a lower rate than whiskey of the same proof bottled abroad and imported. Section 5001(a)(1) of the Internal Revenue Code imposes a flat tax of $10.50 per gallon upon spirits of 100 proof or less, with a proportionate increase for spirits above 100 proof. The tax is imposed when the spirits are withdrawn from bond. 26 U.S.C. 5006(a)(1) (Pet. 4). Domestic whiskey is in practice withdrawn from bond in bulk at 100 proof or above, then diluted, usually to 86 proof, and bottled; the effective tax borne by a gallon of domestically bottled 86 proof whiskey is thus $9.03. Whiskey imported in bottles at 86 proof—as the Scotch and Irish whiskey involved in this case was—is, however, taxed at the full rate of $10.50 per gallon because it is shipped at the lower proof level, and is naturally withdrawn from customs bond at this lower proof.

2. Both courts below correctly concluded that the different effective tax on below-proof domestic whiskey

(removed from bond at 100 proof) and imported whiskey (bottled abroad below 100 proof) did not violate the national treatment provision of the Irish treaty because "like situations" were not involved. The factor which determines the amount of tax is alcoholic volume upon withdrawal from bond, not place of distillation. The distinction between above 100 proof and below 100 proof spirits has been consistently employed in internal revenue statutes for more than a century. See Act of July 20, 1868, 15 Stat. 125. When bottled 86 proof imported whiskeys and bulk 100 proof domestic whiskeys are withdrawn from bond, they are different products for purposes of taxation. A "like" situation is importation of whiskey in bulk at or above 100 proof, with bottling in the United States after withdrawal from bond. The effective tax on whiskey so imported and subsequently diluted to 86 proof is the same as that on 86-proof domestic whiskey.

3. This problem has had a long history. It rests on a statutory scheme which has been in effect without change for more than 100 years. The issue has been frequently raised in the past, and it should be regarded as settled as far as the present law is concerned.

We recognize the great economic importance of the question to producers of spirits in the United Kingdom, Ireland, and other countries. Both the United Kingdom and Ireland have made their strong inter-

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[1] Petitioner incorrectly contends that the other "like situation"—withdrawal from bond of domestic whiskey at below proof—is not possible because of 26 U.S.C. 5233 (Pet. 14). Although that section requires all whiskey bottled in bond for domestic use to be at least 100 proof, it does not prevent withdrawal of below-proof spirits in bulk prior to bottling.

ests known in papers filed with this Court. Nevertheless, we feel that the matter is not one which requires further review here.

There are three ways in which the law in this area might be changed: (a) by treaty, (b) by legislation, or (c) by court decision.

(a) The treaty making power in the United States is in the President "by and with the Advice and Consent of the Senate * * * provided two thirds of the Senators present concur." No such treaty has been adopted; nor has one been proposed to the Senate.

(b) The statutory provisions applicable to this case could be changed by Act of Congress. As is pointed out in the brief of amicus curiae (pp. 15–16), the matter was thoroughly canvassed by Congress in 1950 and 1951, and legislation which would have brought about changes in the statute law was introduced and fully considered. Congress took no action.

(c) Finally, the matter has been fully and carefully reviewed on several occasions by the Court of Customs and Patent Appeals, which is the tribunal especially established to make appellate decisions in customs cases. These decisions extend over a period of many years, and this Court has twice denied certiorari. *Bohemian Distributing Co. et al. v. United States*, 15 Cust. Ct. 121; *Vernon Distributing Co. v. United States*, 39 C.C.P.A. 205; *Berent-Vandervoort*

A communication from the Embassy of Ireland has been filed with the Court in a previous Memorandum for the United States. See also the communication from the Commission of the European Communities, which is set forth in the Appendix to the present Memorandum.

and Co. v. *United States*, 46 C.C.P.A. 28, certiorari denied, 359 U.S. 953; *China Liquor Distributing Co.* v. *United States*, 343 F. 2d 1005, 52 C.C.P.A. 1, certiorari denied, 380 U.S. 962.

In both of the cases where petitions were filed with this Court, the interests of foreign governments were made apparent. Nothing really new is presented in the present petition. The amicus acknowledges (Amicus Br. 17) that the General Agreement on Tariffs and Trade is inapplicable because of the provision of the Protocol to that agreement, which expressly exempts "existing legislation"—and the legislation involved here was in existence long before GATT was entered into. United States adherence to the GATT is by Executive Agreement, not by exercise of the treaty power, and thus could hardly be effective to amend an Act of Congress.

The only matter that is newly raised here is the Irish treaty. But this presents no question which has any difference in substance from those presented and decided in the previous cases. The question was dealt with fully in the *Borcal* case (on the assumption that the similar provisions of GATT applied), which was then followed by the court below in the *China Liquor* case, and in the present case. With respect to the Irish treaty, it may be observed that it became effective in 1950 (Pet. p. 3). It is obvious that there was no contemplation or understanding that the Irish treaty had disposed of the problem when the question of unqualified adherence to GATT was before Congress in 1950 and 1951. To construe the Irish treaty to reach

the result sought by the petitioners here would surely be an afterthought, not intended by the Executive branch nor contemplated by the Legislative branch when the Irish treaty was proposed and approved and when GATT received legislative consideration.

Finally, petitioners contend that there is a conflict between the decision below and that in *Parrott and Co. v. United States*, 156 F. 2d 943 (C.A. 9). Obviously, though, the underlying question there was different from that raised here. Moreover, the issue there was *when* the tax attached to rum produced in the Virgin Islands. The Court held that the tax attached "as soon as distillation was complete," 156 F. 2d at 948, and ruled "that the cases cited, respecting ordinary imported distilled liquors have no application." 156 F. 2d at 947. Petitioners do not argue that the tax on the Irish and Scotch whiskey involved here attaches upon distillation; 26 U.S.C. 5006 expressly states that the tax "shall be determined when the spirits are withdrawn from bond." It is thus clear that the *Parrott* case leaves open the question involved here, and that there is no conflict of decisions.

In these circumstances, there is no reason now for the further review of this problem by this Court.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

APPENDIX

The following communication was received by the United States Mission to the European Communities, in Brussels, and transmitted to the State Department. In accordance with the suggestion which it contained, and at the request of the State Department, it is here placed before the Court.

July 31, 1970
No. 1812

Commission of the
European Communities
Directorate-General
of Foreign Trade

XI–A–1

NOTE VERBALE

The Directorate-General of Foreign Trade of the Commission of the European Communities presents its compliments to the Mission of the United States of America and has the honor of referring to its note verbale of October 1, 1969 in which it had asked the competent authorities of the American government to be so kind as to inform the 'United States Court of Customs and Patents Appeal' of the viewpoint of the European Economic Community on the American taxation system called 'wine gallon assessment', the validity of which has been questioned by an American importer. According to the information obtained by the Directorate-General of Foreign Trade, the importer intends to ask that the litigation be brought to the Supreme Court of the United States.

The European Economic Community considers this taxation system contrary to the international rules based on the GATT provisions. It therefore has a special interest in a possible judgment of the Supreme Court on this question. The Community intends to ask, at the appropriate time, the Government of the United States and the Supreme Court, if it could present its viewpoint as "amicus curiae."

The Directorate General of Foreign Trade would appreciate it very much if the United States Mission would inform the competent authorities of the American government as well as the Supreme Court of the contents of this note.

The Directorate General of Foreign Trade takes this occasion to reiterate to the United States Mission in Brussels the assurance of its highest consideration.

The United States Mission
to the European Communities
Brussels